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No. 99-1870

IN THE

Supreme Court of the United States

EMILY ADLER, *et al.*,

Petitioners,

v.

DUVAL COUNTY SCHOOL BOARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DUVAL COUNTY SCHOOL BOARD AND DUVAL COUNTY PUBLIC SCHOOL DISTRICT

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QUESTIONS PRESENTED

1. Whether the Duval County School Board's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause?

2. Whether the petition for writ of certiorari to the Eleventh Circuit should be granted to further review the 10-2 *en banc* decision holding the policy to be constitutional?

PARTIES TO THE PROCEEDING

The Petitioners consist of past and current students of various schools within the Duval County School District, and they include the following: Emily Adler, Bonnie Bear, Aaron Finck, Benjamin Finck, Rachel Finck, Seth Finck, Tyler Hurley, Monica Juodvalkis, Lucy Nord, Roberta Nord, Jonathan Rand, and Joshua Weihnacht.

There are two categories of Respondents. The Respondents include the Duval County School Board and the Duval County Public School District.

The Respondents also include various student-intervenors who attend schools within the Duval County Public School District. These students and parents moved to intervene as Defendants-Intervenors and are listed below before the Eleventh Circuit Court of Appeals as Movants-Intervenors and herein as Respondents-Intervenors. These Respondents include Susan Boles, Ronald Boles, Rebecca Boles, Mark Muhlbauer, Kenneth Carkhuff, Karlene Carkhuff, Ashton Carkhuff, Stan Carter, Susan Carter, Sarah Carter, Mark Sciullo, Jody Sciullo, Moriah Sciullo, Nicholas Sciullo, Douglas Pigg, Charlotte Pigg, Jonathon Pigg, and Tim Howard.

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STATEMENT OF THE CASE[1]

The decision below held that a policy allowing students to elect a high school graduation speaker, without any input, constraints, or modifications to the student's speech, did not violate the First Amendment. On July 22, 1992, following this Court's decision in *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed 2d 467 (1992), Vicki Reynolds, Liaison for Legal Affairs for the Duval County School Board, sent a memo to all Duval County school principals which expressly prohibited all prayers, benedictions and invocations at all graduation ceremonies. Thereafter, in 1992, the Fifth Circuit Court of Appeals decided *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992). *Clear Creek* held that student initiated prayers at high school graduation ceremonies were constitutional under limited circumstances. Following the publication of this holding, Dr. Larry Zenke, the Superintendent of the Duval County School System, and Ms. Reynolds received many inquiries about whether voluntary student initiated prayer at graduations was allowed. Dr. Zenke asked Ms. Reynolds to investigate. Ms. Reynolds, on behalf of the Duval County School System, sought an opinion from the Office of General Counsel, the Board's attorneys, on the status of the law in this sensitive area.

The Office of General Counsel researched the issues and responded with a 28-page legal analysis of the constitutional principles involved dated April 27, 1993. This opinion analyzed the *Lee* test, the *Lemon* test [*Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)], Fifth Circuit, Eleventh Circuit and other establishment clause case law precedents — approximately 20 decisions in all. The Office of General Counsel recommended a policy of governmental neutrality toward

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1. There have been four published opinions and an unpublished final order in this litigation. This brief uses the same roman numerical identification of the published opinions that the petition sets forth at pages 3 and 4.

religious speech and to completely remove governmental actors from the students' decision-making processes.[2]

After receiving and discussing the Office of General Counsel's legal analysis with the superintendent, Ms. Reynolds sent a memorandum to all high school principals dated May 5, 1993, which adopted these recommendations and established the following substantive guidelines:

> 1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
>
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
>
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

Ms. Reynold's memorandum stated as to its purpose:

> The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.[3]

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2. As the Eleventh Circuit noted, "There is nothing inappropriate about a school system attempting to understand its constitutional obligations and to instruct school officials on how to comply with the law." *Adler* IV, 206 F.3d at 1086.

3. Threats from advocates and opponents of student religious speech surrounded the 1993 graduation season. The Policy notes on its face: "[T]his area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take." The Board was struggling to find the right course (Cont'd)

The 1993 Graduations

The 1993 high school graduations occurred in due course at Duval County's 17 public high schools with the guidelines suggested in the Reynolds' memorandum of May 5, 1993, serving as the District's policy in this area by acquiescence or tacit approval. Adler I, 851 F. Supp. at 449. At 7 of the 17 high school graduations in 1993 (41% of the total number of public high schools in Duval County), there either was no religious content to any of the spoken messages of the students elected by their senior class peers, or no student message at all. Adler IV, 206 F.3d at 1072. At the other 10 high schools, there was some form of religious speech. For example, at one school a Hindu student offered a prayer. Superintendent Larry Zenke testified:

> I do recall one of the commencements, a student offered a prayer who is of the Hindu faith, which I thought was an interesting selection on the part of the student body to have her deliver the message to the students.

Procedural History

Following the 1993 graduations, Plaintiffs' predecessors filed suit in federal district court in Jacksonville seeking to invalidate the Policy. The lead plaintiff in the first case was Karen Adler. Plaintiffs initially sought a preliminary injunction along with facial and as applied claims on the merits. Following discovery, the trial court held the Policy was constitutional and granted the School Board's motion for summary judgment.

(Cont'd)
and to avoid the fray. Board Chairman Donald Buckley voiced the clear concern that the Board remove itself from the decision making process completely during Board debate a month later on a moment of silence proposal which was rejected: "I think the only way we can keep ourselves clear on this thing is to keep ourselves out of what happens in this area of the graduation ceremony." *Adler v. Duval County School Board*, 206 F.3d 1070, 1088, note 8 (11th Cir. 2000) ("*Adler* IV").

Adler I. Plaintiffs appealed. The Eleventh Circuit affirmed without reaching the constitutional issues, *Adler v. Duval County School Board*, 112 F.3d 1475 (11th Cir. 1997) ("*Adler* II"), holding that the claims for injunctive and declaratory relief were moot due to the graduations of various student plaintiffs and that the damages claims had been waived. *Adler* IV, 206 F.3d at 1073.

This case, by EmilyAdler *et al.*, was filed in May 1998. It was heard by the same district judge who heard and decided *Adler* I, and challenged the Policy on substantially the same record. New plaintiffs were selected to try to cure the mootness issues.

The record for the intervening years' graduations is truncated due to the procedural posture of the 1998 case and Plaintiffs' tactical decisions and consents. Plaintiffs sought a preliminary injunction, which the trial court consolidated with the trial on the merits with Plaintiffs' consent. This left little time for supplemental discovery. *See Adler* IV, 206 F. 3d 1073-74, note 4. As a result, there is no evidence in the record whether any religious speech was delivered in the graduations of 1994, 1995, 1996, 1997, or1998.[4] The trial court again sustained the Policy, this time in an unpublished order, and Plaintiffs appealed.

A three judge panel of the Eleventh Circuit initially reversed and found the Policy to be unconstitutional on its face in a 2-1 opinion. *Adler* III. The Board and Intervenors then filed motions for rehearing *en banc*, which were quickly granted. The Eleventh

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4. *See Adler* III, Petitioner's Appendix, p. 87a at note 4, p. 135a. The only materials in the record from these graduations are printed commencement programs. Appellants' claim in the petition that "since the enactment of the policy," the messages "most often constituted prayers" (Petition, pg. 5), is unproven and unsupportable.

Circuit held in a 10-2 *en banc* decision that the Policy is constitutional on its face.[5] Appellants sought certiorari review.

Three months after the Eleventh Circuit affirmed the Board's Policy *en banc* in Adler IV, this Court released its opinion in *Santa Fe Independent School District v. Doe*, Case No. 99-62, __ U.S. __, 2000 WL 775587, 13 Fla. L. Weekly Fed. S425 (June 19, 2000)("*Sante Fe*"). The School Board then requested and received approval to file this brief in opposition to the pending petition for writ of certiorari to the Eleventh Circuit.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit, in a 10-2 *en banc* decision, held that the Duval County School Board's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is not facially violative of the establishment clause. The holding is consistent with and correctly applies the constitutional standards established in *Lee v. Weisman* and *Lemon v. Kurtzman*.

The Duval County Policy complies fully with *Lee*. It neither establishes nor prohibits religious speech. It merely permits graduating senior classes to decide whether or not to include an unrestricted message as part of their ceremonies. If they decide to include a message, they choose a speaker. That individual decides what to say without any government monitoring, review or censorship whatsoever. Accordingly, any

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5. This appeal presents only a facial challenge to the Policy. *Adler v. Duval County School Board*, 206 F.3d 1070, 1073-74 (11th Cir. 2000) ("*Adler* IV"). The Policy on its face does not call for votes to be taken on "the specific issue of whether to include prayer at graduation," contrary to Appellants' assertions. Compare petition, page 5. The votes are on messages, not prayers. Nor does it call for "senior class officers" to vote on the student speakers at graduation. Compare petition, page. 5.

student messages are purely private speech and are not attributable to the state. There is no government endorsement or sponsorship of coercive formal religious exercises.

During the 1993 graduations which occurred under this Policy, the students chose 41% of the time to have secular content or no messages at all (at seven of the 17 graduations) and some form of religious speech at the other ten ceremonies. This divided result is consistent with and evidence of the content and viewpoint neutrality of the Policy. There is no evidence of the content of remarks given in subsequent years due to Plaintiffs' tactical choices.

The Duval County Policy also complies fully with the *Lemon* test. It has three legitimate underlying secular purposes: allowing students to direct a portion of their own graduation ceremony, thus sharing in the civic responsibility of planning their ceremony; solemnization of the graduation ceremony; and permitting student freedom of expression. It also satisfies the primary effect prong of *Lemon* because it equally allows either religious or secular speech and does not even require that any graduation messages occur. Nor does it violate the excessive entanglement prong, because government review, monitoring and censorship of content is prohibited.

The Eleventh Circuit's holding also is fully consistent with this Court's recent holding in *Santa Fe*. The *Santa Fe* policy was invalidated because the history, practices and policy in *Santa Fe* were designed and intended to perpetuate a longstanding practice of prayer at football games. Its terms contemplate religious expression on its face. Students had a majoritarian vote specifically to have prayer at games, and school administrators retained content controls over the student speech. This is in total contrast to the Duval County School Board's neutral posture and hands-off approach.

The Duval County history, practices and Policy are fundamentally different. The Policy is content-neutral on its

face. Since it is a graduation speech policy, not a football game prayer policy, solemnization is a proper purpose which it advances. It was adopted for appropriate reasons, not for sham reasons. Finally, the student votes feature does not infringe on minority rights since there is no express vote to have prayer, the Policy provisions are content-neutral and government involvement is prohibited.

The decision below conforms with established U.S. Supreme Court case law, does not conflict with any Circuit Court opinion, and is unique in its facts. The Petition for Writ of Certiorari therefore should be denied, and the *en banc* holding of the Eleventh Circuit should be left undisturbed.

REASONS FOR DENYING THE WRIT

I. THE DUVAL COUNTY SCHOOL BOARD'S POLICY OF PERMITTING A GRADUATING STUDENT, ELECTED BY HER CLASS, TO DELIVER AN UNRESTRICTED MESSAGE OF HER CHOICE AT THE BEGINNING AND/OR CLOSING OF GRADUATION CEREMONIES IS NOT FACIALLY VIOLATIVE OF THE ESTABLISHMENT CLAUSE.

A. The Decision Below Properly Protects First Amendment Principles.

The Duval County School Board's student message Policy contained no indicia of school endorsement, nor any role for school authority's participation.

The Eleventh Circuit framed the issue in this appeal as follows:

> The central issue presented is whether the Duval County school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the

> beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause.

206 F.3d at 1073. The Court concluded:

> Close attention to the operative features of the Duval County policy yields the conclusion that the policy is constitutional on its face. Simply put, the selection of a graduation student speaker by a secular criterion (not controlled by the state) to deliver a message (not restricted in content by the state) does not violate the Establishment Clause merely because an autonomous student speaker *may* choose to deliver a religious message.

Id. at 1073-74. The Eleventh Circuit succinctly summarizes why this is so: the constitutional principle of neutrality:

> [But] at the core of Establishment Clause jurisprudence is the notion that the state may not favor, endorse, or oppose the propagation of religious doctrine by its citizens. In this case, the absence of state involvement in each of the central decisions — whether a graduation message will be delivered, who may speak, and what the content of the speech may be — insulates the School Board's policy from constitutional infirmity on its face.

Id. at 1075.

B. The Eleventh Circuit's holding is consistent with this Court's holdings in *Lee v. Weisman* and *Lemon v. Kurtzman*.

This Court held the school policy in *Lee* to be unconstitutional where the principal of the school handpicked a rabbi to deliver an invocation at a middle-school graduation

and provided content requirements for the prayer, concluding that the prayer delivered "was in every sense endorsed and supported by the state" as a result. *Compare Adler* IV, 206 F.3d at 1076. Further, *Lee* held that where State officials direct the performance of a formal religious exercise for students who in essence are compelled to be present and participate, such actions violated the establishment clause. *Lee*, 505 U.S. at 586.

The Policy and the facts in this case stand "in striking contrast" to those in *Lee*. *Adler* IV, 206 F.3d at 1076. Besides the obvious but fundamental difference that in *Lee v. Weisman*, the speaker was a rabbi, a religious professional, while in this case, the speakers are students, there are other important differences:

> . . . under the Duval County graduation policy, however, neither the School Board nor its principals may ordain, direct, establish, or endorse a religious prayer or message of any kind. Indeed, by the very terms of the policy, a religious message may not even be offered at graduation. The Duval County policy explicitly divorces school officials from the decision-making process as to whether *any* message-be it religious or not — may be delivered at graduation at all.

Adler IV, 206 F. 3d1076. The Court continued:

> Under the policy, the School Board and its agents have no control over who will draft the message (if there be any message at all) or what its content may be. The School Board also does not suggest in any way, let alone require, that the graduating class consider religious or other criteria in deciding whether to have a student message or in selecting a particular student speaker. And most notably, if the graduating class chooses to have a message, the content of the message shall be

> prepared by the student speaker alone and no one else. The Duval County School Board is expressly prohibited by the very terms of its policy from influencing or editing the message in any way.

Id. The Eleventh Circuit found these operational features distinguished the Duval County policy from the Providence policy this Court invalidated in *Lee*:

> Unlike the Providence policy in *Lee*, the Duval County policy, in no way, authorizes a school to "direct the performance of a formal religious exercise." (citation to *Lee*) And unlike a direct student plebiscite on graduation prayer, not even the senior class exercises control over the content of the graduation message. That decision rests solely with the elected student speaker — with neither the senior class nor the school exercising any sort of editorial oversight.

Id. Nor does the Policy endorse or support religion more generally. As the court further notes at page 1077:

> No feature of the Duval County Policy favors or endorses religion. The graduation policy is simply content-neutral, and allows an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis.

The Eleventh Circuit also reviewed a line of this Court's open forum cases[6] and returns to the constitutional bedrock of government neutrality:

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6. *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981); *Board of Educ. v. Mergens*, 496 U.S. 226, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2240, 132 L. Ed. 2d 650 (1995); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

> These cases strongly suggest that a policy, like the Duval County graduation policy, which provides an opportunity for student-selected, student-initiated private expression through a neutral selection criterion, does not violate the Establishment Clause simply because the venue is equally available for religious or secular expression. Government neutrality towards religion is all that is required by the Establishment Clause. And it is worth emphasizing that while the state must be neutral and cannot advance or endorse religion, similarly, it need not, indeed it cannot, act in a hostile manner in the face of private religious speech publicly uttered.

206 F.3d at 1078.[7]

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7. This Court recently strongly reaffirmed its commitment to content neutrality or "viewpoint neutrality" in the context of First Amendment student speech. In *Board of Regents v. Southworth*, 529 U.S. __, 120 S. Ct. __, 146 L. Ed. 2d 193 (2000), a group of University of Wisconsin students sued to challenge the University's requirement that all students pay mandatory student activity fees of over $300 which were allotted by the student government to various registered student organizations ("RSO's") under three different methods: from a Student Government Activity Fund ("SGAF"), from a General Student Services Fund ("GSSF"), and through specific student body votes to approve or disapprove an assessment for a particular RSO. 146 L. Ed. 2d at 202. The range of views of RSO's ran the full political, ideological and social gamut from Democrats to Republicans to the ACLU to gay rights advocacy to AIDS support to campus tutors to a radio station to a women's center. *Id.* The Plaintiffs did not want their money to support "expressive activities" that conflicted with "their own personal beliefs." 146 L. Ed. 2d at 204.

The parties stipulated that the SGAF and the GSSF were administered in a viewpoint neutral manner. *Id.* at 203. They did not so stipulate as to the referendum process, however. Although the record was "sparse" on that feature, it appeared that a referendum could "defund" a particular RSO or veto a student government funding allocation. *Id.* at 202-203.

(Cont'd)

The Policy permits seniors to have a message at either the beginning or end of the ceremony, or both. Under this option, two different students could be chosen, one for the beginning, and another for the end, thus expanding diversity of viewpoints and topics. Graduates could elect any one of their classmates to speak, for any reason at all ("be it popularity, ability to entertain, achievement in athletics, or for some other reason." *Cf.* 206 F.3d at 1082).

The Eleventh Circuit notes that attributing all private speech which occurs at a public graduation event to the government due to the time, manner and place controls and general sponsorship of the event by the school would improperly obliterate the distinction between private and public speech:

> First, we reject the notion that the religious content of *any* speech at a graduation ceremony is attributable to the school merely because of the

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(Cont'd)

Although appellants rely principally on *Southworth* as the reason why their petition for certiorari should be granted, this Court's holding in *Southworth* strongly supports the School Board's Policy and the Eleventh Circuit's *en banc* decision. For instance, Justice Kennedy for the Court quotes with approval language from the dissenting opinion below in *Southworth* on the "crucial difference" between a requirement to pay money to an organization explicitly aiming to subsidize "one viewpoint" to the exclusion of other viewpoints, and "a requirement to pay a fee to a group that creates a viewpoint — neutral forum, as is true of the student activity fee here." *Id.* at 205. The Court also holds that even though *the University* charged the fee, the government itself was "not the speaker." That was because "[T]he University of Wisconsin enacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." *Id.* at 206. In doing so, "it may not prefer some viewpoints to others." *Id.* at 208. By comparison, the Policy here does not favor one viewpoint or type of speech over any other. It is purely "viewpoint" or "content" neutral on its face. The "referendum" aspect of *Southworth* is discussed below at page 23 in Section C of this brief comparing and contrasting the policy here with the Policy in *Santa Fe*.

> school's sponsorship of the event or its control over the graduation's schedule, timing, decorum, or sequence of events. The Supreme Court did not suggest in *Lee* that school sponsorship of the graduation event, standing alone, was sufficient to find the Providence policy unconstitutional, or it would have banned all religious expression at graduation. If Appellants were right on this point, graduation speakers as diverse as athletes, politicians, academics, entertainers, and maybe even judges would bear the imprimatur of the state because they were hand picked by the school (or, in our case, elected by the senior class) to speak at an event over which the school has great control.

Id. at 1080.

The Court posits that even accepting a large degree of government control over the time, manner and place[8] of graduation ceremonies, the Duval County Policy does not violate the Establishment Clause:

> It is clear that it [the school board] did not have control over the elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place. It is beyond

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8. Appellants' assertion that the School Board exercised a "high degree of control"over "all" aspects of graduation ceremonies is overstated. The Eleventh Circuit noted school control over "schedule, timing, decorum and sequence of events." However, the evidence in the record is that the students at the various schools typically determined what sort of graduation ceremony they would like to have, the themes, who the invited guest speakers would be, the order of presentation, the type of music, whether or not the parents would join them on the floor at the end of the ceremony, and the like.

> imagination to say that everyone on the platform at a high school graduation ceremony, including a local politician or celebrity, is a state speaker merely because the state has provided the platform, onto which private individuals may be invited to share their privately held views. Such views do not become the state's views merely by being uttered at a state event on a state platform.

Id. at 1080. Thus, Appellants' assertion on page 10 of their petition that the Eleventh Circuit majority "reads state control of graduations" . . . "out of existence in this case . . ." distorts the Eleventh Circuit's opinion and is incorrect. The Eleventh Circuit acknowledges the schools' "sponsorship of the event" and that the state controls many logistical aspects of graduations. *Id.* This is inherent in the nature of a graduation, like scoreboard clocks and penalty flags at a football game. However, the Eleventh Circuit correctly focuses on the crucial issue — that state control of the selection of a student messenger, the content of the message, and whether or not there will be a message in the first place under the Duval County Policy is totally absent. *Id.* at 1080-81.

The Court also rejects the notion that the government's failure to censor student speech means that it endorses that speech under the Policy:

> Second, we reject the claim that allowing students to vote for a graduation message and to select the student speakers automatically places the imprint of the state on the student speakers' privately-crafted messages. Appellants' leap of logic, taking a selected student representative and, without explanation, turning her into a state actor by virtue of a democratic student vote, strains credulity. At most, a student speaker selected by a class vote

> is a representative of the student body, not an official of the State.[9]

Id. This is fully consistent with this Court's observation in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226, 250, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990):

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis.* . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

(Part III, plurality opinion, O'Connor, J.) (emphasis added) (citations omitted). The Eleventh Circuit continued:

> All of the policy's central decisions — who speaks, whether there will be a speaker, and what the content of the speech may be — are uncontrolled by the state . . . the mere delegation of decision-making *to pick a speaker alone* does not place the state's imprint on graduation prayer delivered by an autonomous student speaker who is free to give a message of unrestricted content. (Emphasis added.)
>
> * * *
>
> In fact, the state's only involvement in the graduation message is to provide students with the opportunity to vote, to impose a time limit of

9. See the discussion in Section C below of the *Southworth* and *Santa Fe* referendum issue.

> two minutes, and to direct that the message be delivered at the beginning and/or closing of the ceremony.

Id. Contrary to Petitioner's position in their petition, the Court observes that such restrictions would permit a student to "deliver a poem or sing a song". *Id.* at 1082.[10] The fact that there was a "neutral" mechanism which may result in an "unrestricted message" does not make private speech into public speech. In the words of the Eleventh Circuit:

> When a student is chosen in a neutral and secular way *and* where the student is allowed complete autotomy over the message, the student's speech is her own.

Id. at 1083. This answer is the logical, correct result to the issue left unaddressed in *Lee* as posed by Justice Souter in an opinion joined by Justices Stevens and O'Connor:

> If the State had chosen its graduation speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had *individually* chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

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10. Petitioners contend that the "duration and placement" of the student messages is "consistent solely" with the tradition of invocations and benedictions. This is unfounded. Besides the two other examples the Eleventh Circuit gives, allowing students to speak briefly at the beginning or end of ceremonies is consistent with many things: greetings and farewells, readings of either secular or religious substance, comedy, remembrances, music, and a whole spectrum of messages and viewpoints. A recitation of Rudyard Kipling's "If," a testimonial to individuals marching to the beat of their own drummers, and not following the crowd, easily would fit and inspire commensurate with the occasion. See the Eleventh Circuit's discussion at 206 F.3d 1078-79, especially its analysis of other Circuit Courts of Appeals cases in footnote 7.

505 U.S. 577, 630, 112 S. Ct. 2649, 120 L. Ed. 2d at 467, at note 8. (Emphasis added).

As to the second prong of the *Lee* test, coercion to "support or participate in religion or its exercise," the Eleventh Circuit correctly distinguishes between the measure of state control over the message, rather than state control over the graduation ceremony itself. "[T]he focus must be on whether the state has endorsed the message in an appreciable manner," 206 F.3d at 1083, in light of the inherent nature of graduation ceremonies. The Court then observes:

> Here, neither the Duval County schools nor the graduating senior classes even decide if a religious prayer or message will be delivered, let alone "require" or "coerce" the student audience to participate in any privately-crafted message. While schools may make private religious speech their own by endorsing it, schools do not endorse all speech that they do not censor.

Id. at 1083. To reduce the matter to its essence, and crystalize the distinction between the graduation message policy in this case and the football prayer policy in Texas:

> No religious result is preordained under the policy.

Id. at 1084 (emphasis added).

This has proven to be absolutely true in practice. Neutral provisions have produced neutral results. The students' choices have been divided approximately equally between some form of religious speech on one hand, and either purely secular messages or no student messages at all on the other. As noted above, at 41 percent of the Duval County graduations in 1993, the only year for which plaintiffs produced evidence of the words the students actually spoke, there was no religious speech, or no message at all, by the student speakers.

The Eleventh Circuit also fully analyzed the Policy under the *Lemon* test and properly found it meets all constitutional requirements. 206 F.3d at 1084-1090. In discussing the first prong of the test, secular purpose, the Eleventh Circuit notes that the Policy has three clear secular purposes. 206 F.3d at 1085. The first is one Appellants totally ignore — the purpose stated in the text of the Policy: to allow the students to direct their own graduation ceremony by selecting a student speaker to speak without monitoring or review by school officials. *Id.* at 1086. The court found this properly permits the graduating seniors to share in the civic responsibility of planning their ceremony. The court also found the legitimate secular purpose of solemnizing the ceremony was advanced, citing this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring); and *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997); *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir. 1997); and *Jones v. Clear Creek, supra*. This Court's recent decision in *Santa Fe* reaffirms that solemnization is appropriate in the context of a graduation ceremony, the culminating experience of a high school student's career, but not before a series of informal, recurring sporting events like football games. *See* __ U.S. __, 13 Fla. L. Weekly Fed. at S426. *See also* pages 22-23 below.

The Eleventh Circuit also concluded that the Policy advances a third appropriate secular interest "in permitting student freedom of expression," whether it "takes a secular or religious form." 206 F.3d at 1085. Citing this Court's decisions in *Capitol Square Review & Advisory Board v. Pinette, supra, Mergens, supra,* and *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir. 1992) (*en banc*), the court notes that religious speech under the First Amendment is not an orphan, but is as fully protected as secular speech, and that preventing discrimination against religious and other types of speech undeniably serves a

secular purpose. 206 F.3d at 1085.[11] The Policy clearly satisfies this portion of *Lemon*, since it has *a* secular purpose and is not motivated "wholly" by an impermissible purpose. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 64, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985); *Lynch, supra*, 465 U.S. at 668.

The Eleventh Circuit concluded that because the Policy on its face allows a student message on any topic of the student's choice, it satisfies the second prong, primary effect, of *Lemon*. The Policy is "content-neutral and does not mandate or even encourage that a graduation prayer will be uttered." 206 F.3d at 1089. The court further notes that in many cases, implementation of the policy "may result in no graduation prayer at all," citing Adler I, 851 F. Supp. at 454. *Id.* at 1089. As noted, this was true at 41% of the graduations in 1993.

On the third prong, excessive entanglement, the Duval County School Board undoubtedly would find itself far more entangled with religion if it attempted to eradicate all religious content from student messages, than if it maintains its meaningful policy of studied neutrality. *See* 206 F.3d at 1090. Part of this is due to the difficulty of determining what speech is "religious" speech.[12]

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11. The Court also fully considered and rejected Appellants' various arguments that the secular purposes behind the Policy were a "sham." *See* 206 F.3d at 1085-89. Among Appellants' contentions here is a twisting of the import of the policy's introductory reference. The petition repeatedly states that the Board's Policy is titled or "entitled" "Graduation Prayers." This is misleading. Rather, the subject matter reference of Ms. Reynold's memorandum states it is "*RE*: GRADUATION PRAYERS." (Emphasis added). As the Eleventh Circuit discusses at length, this "merely introduces the topic of debate" and "does no more than alert the reader to the general subject matter of the text." It does not control the language and substance of the wording of the Policy text. *Adler* IV, 206 F.3d at 1087.

12. *See* 206 F.3d at1090, fn. 11 for this Court's definition of "religion." And see the intervenors' brief in opposition at page 21

(Cont'd)

The Eleventh Circuit held:

> Duval County School's system policy of permitting graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies does not facially violate the Establishment Clause.

206 F.3d at 1090-91. This holding is well reasoned and should be left undisturbed.

C. The Eleventh Circuit's holding is consistent with this Court's holding in *Santa Fe*.

1. *Santa Fe's History, Practices and Policy promoted religious prayer.*

In *Santa Fe*, the school district had a long history of prayer before games and other practices and acts plainly favoring and endorsing proselytizing sectarian religious pursuits. Certain Mormon and Catholic plaintiffs anonymously sued to attack

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regarding the difficult problem of content censorship under any injunction which would prohibit all religious expression during student graduation messages at the podium. This problem goes beyond the issue of the "mechanism" by which student speakers are chosen. Does a valedictorian chosen by the pure secular criterion of class ranking and outstanding academic achievement commit an establishment clause violation attributable to the School Board by leading the audience in the Lord's Prayer as part of her remarks? Even if she does so on the spur of the moment if her secular remarks were preapproved? (*Compare Southworth's* discussion of what is "germane" speech for a university. 146 L. Ed. 2d at 207). These are not easy issues. School officials should not be in the business of censoring these matters or having to hold their collective breaths to see who says what over the microphone. If the Policy here is invalid on its face, school officials would be left with only two poor alternatives: eliminating student speech altogether or retaining student speech subject to heavy censorship regarding religious content. 206 F.3d at 1090. Neither course advances the causes of the First Amendment's religion and speech clauses.

the policy. Secrecy was required to protect the families from harassment. Before 1995, the elected student council Chaplain led overtly Christian prayers before games over the public address system for the entire season. The district also allegedly promoted attendance at Baptist revival meetings, encouraged membership in religious clubs, chastised children of minority religious beliefs, distributed Gideon Bibles on school premises, and allowed students to read Christian invocations and benedictions from the stage at graduations. __ U.S. at __, 13 Fla. L. Weekly Fed. at S425-26.

The district passed a series of four policies, the last of which was before this Court for review. The first two related to graduations. The latter two related to football games but derived from the graduation policies. The four policies were adopted after an interim district court order of May 10, 1995 was entered permitting non-denominational prayer at the impending graduation. 13 Fla. L Weekly Fed at S426.

The first policy allowed a senior class secret ballot on whether or not to have religious invocations or benedictions as part of the graduation exercise. If so, the class would then elect student volunteers to present them. In July, the district passed a second graduation policy eliminating a "nonsectarian and nonproselytizing" requirement present in the first policy. An automatic fallback provision was included to reinstate that provision if the sectarian version were enjoined. In August, the district enacted a football games prayer policy. It was similar to the July graduation policy, including a similar fallback provision. On August 31, 1995, the students voted to have prayer and elected a student "to deliver the prayer at varsity football games" a week later. Finally, in October, the district adopted another football game policy omitting the word "prayer" from the title, and referring to "messages" and "statements" as well as retaining mention of "invocations." *Id.*

This Court looked at the history behind the policy under review and the district's clear religious intent and purpose, and

determined the student prayers could not properly be considered true private speech, and instead were "attributable" to the government: "These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events." This Court also recognizes, importantly: "Of course, not every message delivered under such circumstances is the government's own." __ U.S. __, 13 Fla. L. Weekly Fed. at S427.

2. *The Duval County Policy and the Santa Fe Policy are Fundamentally Different.*

The differences between the policy, history, and facts in Santa Fe and their counterparts in this case are clear. Among the fundamental differences are the following:

1. Under the Santa Fe policy, prayers would always result and a minority view would never be expressed. This Court held in *Santa Fe*:

> . . . the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

13 Fla. L. Weekly Fed at S427. As this Court determined, there would be "an inevitable pre-game prayer." 13 Fla. L. Weekly Fed at S428.

In contrast, the Duval County School Board's Policy does not inevitably result in prayer. In fact, the Eleventh Circuit stated that "No religious result is preordained under the policy." 206 F.3d at 1084. Indeed, in 1993, under the Duval County School Board's Policy, 41% of the high schools either had no message or had a message without religious content; of the remaining messages, one such message was given by a Hindu speaker.

2. The *Santa Fe* policy involves football games while this case involves high school graduations. Recurring prayers before

weekly, garden variety football games ("frequently-recurring, informal school sponsored events") are one thing. Inspirational or commemorative greetings, farewells or other messages during the pomp and circumstance of senior graduation ceremonies are quite another. This Court favorably notes the Fifth Circuit's observation that football games are "hardly the sober type of annual event that can be appropriately solemnized with prayer." They contrast with the "singular context and singularly serious nature of a graduation ceremony," "a significant, one-in-a-lifetime event." __ U.S. __, 13 Fla. L. Weekly Fed. at S426. Solemnity is highly appropriate on such a public occasion. *Cf. Lynch v. Donnelly*, *supra*, 465 U.S. at 693 (O'Connor, J., concurring).

3. The *Santa Fe* policy involves a vote on whether to have *prayer* at varsity football games. 13 Fla. L. Weekly Fed. at S426. Counsel stipulated to this. By contrast, the Duval County Policy does not involve a vote on prayer.[13]

4. The *Santa Fe* policy had content review of the student expression to insure that it was consistent with the subjective sense of propriety and purposes of the school administration.

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13. In *Southworth*, *supra*, this Court found a referendum feature of student activity fee funding mechanisms to be of concern "to the extent the referendum substitutes majority determinations for viewpoint neutrality" and does "nothing to protect minority views," but rather to holds such views "at the mercy of the majority." *Santa Fe*, 13 FLW Fed. at S427. Particular expenditures for identifiable organizations, causes or viewpoints could be overridden or prevented. *Southworth*, 146 L. Ed. 2d at 202-03. The Court remanded for further consideration of the problem in *Southworth*. Both *Southworth* and *Santa Fe* are fundamentally different from the substance of the Duval County Policy. Under the Duval County Policy, students vote on content neutral messages first with no limit or suggestion as to the type of speech, religious or secular, which is appropriate to open or close a ceremony. Only then do the students pick a speaker who decides what to say. The *individual* decides if the remarks will include religious speech or not. There is pure individual choice, not majority rule.

There were "particular regulations that confine the content and topic. . . ." 13 Fla. L. Weekly Fed. at S427. Censorship thus remained not only possible, but expected. By contrast, the Duval County School Board Policy prohibits all government monitoring or review of content. There is no censorship.

5. The *Santa Fe* policy was found to be a sham and intended to perpetuate religious practices. __ U.S. __, 13 Fla. L. Weekly Fed at S428. By contrast, the Eleventh Circuit expressly concluded that the Duval County Policy was not a sham. The Duval County Policy never mentions or contemplates the delivery of either "prayer" or "invocations." It is content neutral and neither requires nor prohibits religious speech.

6. Under the *Santa Fe* policy, a single student gives religious speeches all season long. Usually this is ten games a year. 13 Fla. L. Weekly Fed at S427. For ninth graders, this could total 40 games over four years. By contrast, under the Duval County Policy, one senior speaks one day at a solemn ceremony commemorating the end of high school careers for seniors and the beginnings of the next phases of their lives.

7. The text of the *Santa Fe* policy contemplates speech which will be religious in nature. The last line of the October policy states that any speech "must be nonsectarian and nonproselytizing," clearly religious terms. By contrast, the Eleventh Circuit found that the Duval County School Board Policy is purely content-neutral on its face.

8. The *Santa Fe* policy "invites and encourages" religious speech by using the words "solemnize" and "invocation" in the text of the policy. This was among the factors which led the Court to conclude that the *Santa Fe* "election mechanism, when considered in light of the history in which the policy in question evolved" was only "a device the District put in place that determines whether religious messages will be delivered at home football games." 13 Fla. L. Weekly Fed at S428. (emphasis added). This stands in clear contrast to Duval County's content-neutral Policy.

II. THE PETITION FOR WRIT OF CERTIORARI TO REVIEW THE 10-2 *EN BANC* DECISION OF THE ELEVENTH CIRCUIT HOLDING THE DUVAL COUNTY SCHOOL BOARD'S POLICY CONSTITUTIONAL SHOULD BE DENIED.

The decision below is clear, persuasive and compelling, and correctly sets forth and applies the constitutional principles and standards governing the competing First Amendment interests presented at high school graduation ceremonies. It properly concludes that the Policy meets all constitutional requirements. Moreover, there is no conflict with decisions in other circuits or with this Court's precedents.

The Eleventh Circuit's holding correctly affirms a neutral Duval County School Board Policy which strikes the correct balance between two impermissible extremes. If the government policy pendulum swings too far in one direction, so that the government sponsors prayer at a high school graduation, it violates the Establishment Clause of the First Amendment. If the pendulum of government policy swings too far in the other direction, however, such that there is a prohibition of all religious speech at a high school graduation, such action similarly violates the Establishment Clause of the First Amendment and is also violative of free speech rights. The Duval County School Board Policy achieves the neutrality required by the Constitution: it neither requires nor prohibits religious speech. The Policy permits individual choice without endorsement, sponsorship, coercion or prohibition.

As demonstrated above, the Eleventh Circuit's holding is consistent with and properly applies both the *Lee* test and the *Lemon* test. It is consistent with *Santa Fe* because of the fundamental differences between the policy, practices and history in that case and those in Duval County. The Eleventh Circuit is correct. The Duval County School Board Policy is constitutional.

CONCLUSION

The Eleventh Circuit en banc opinion does not conflict with any opinion of this Court, or with any other Circuit Court opinion. Accordingly, for these and all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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